83-806

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

DOMINICK D'AGOSTINO,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM M. KUNSTLER
Kunstler & Mason
13 Gay Street
New York, New York 10014
(212) 924-5661

Attorney for Petitioner

QUESTIONS PRESENTED

1. Does the deliberate exclusion of women from the position of federal grand jury foreperson violate the equal protection and/or due process guarantees of the Fifth Amendment to the Constitution of the United States of America?

2. Does the exclusion of women from the position of federal grand jury foreperson violate the "impartial jury" clause of the Sixth Amendment to the Constitution of the United States?

PARTIES

Dominick D'Agostino and the United States of America.

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TABLE OF AUTHORITIES

Petitioner D'Agostino fully adopts and incorporates by reference all authorities cited in the Table of Authorities in the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed October 24, 1983.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Third Circuit was entered on September 27, 1983. A Petition for Rehearing and Suggestion of Rehearing *In Banc* was denied by an order entered on October 24, 1983, and this petition for a Writ of Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner D'Agostino fully adopts and incorporates by reference all constitutional provisions cited in the petition for a Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *United States v. Aimone*, 715 F.2d 822 (3rd Cir. 1983), is referred to in Appendix B and reproduced in full in Appendix A to the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983. The order of the United States District Court for the Third Circuit, denying petitioner's Petition for Rehearing and Suggestion of Rehearing *In Banc*, unreported, is reproduced in full in Appendix E. The opinion of the United States District Court for the District of New Jersey in *United States v. Musto*, 540 F.Supp. 346 (D.N.J. 1982) is referred to in Appendix C and reproduced in full in Appendix B to the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983. The unreported order of the Hon. H. Curtis Meanor, adopting the record in *United States v. Musto* is reproduced in full at Appendix D.

STATEMENT OF JOINDER

Pursuant to Supreme Court Rule 19.4, petitioner D'Agostino hereby joins the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983, and incorporates by reference all arguments in support of the petition, all relevant appendices, and all other relevant material.

Pursuant to Supreme Court Rule 19.4, petitioner D'Agostino also joins, in part, the Petition for Writ of Certiorari filed in *United States v. Hobby*, 702 F.2d 466 (4th Cir. 1983). No. 82-2140, on June 29, 1983. Petitioner joins so much of that petition as relates to the constitutionality of excluding Black people from the position of federal grand jury foreperson.

No. _____

IN THE

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October Term, 1983

DOMINICK D'AGOSTINO,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

Dominick D'Agostino was indicted by a federal grand jury for the District of New Jersey on April 28, 1981, and charged with various violations of 18 U.S.C. §§ 894, 2314, and 1952, thereby giving the United States District Court for the District of New Jersey jurisdiction over petitioner.

Arraignment on that Indictment, No. 81-145, as well as on *United States v. Musto*, No. 81-144, in which petitioner was a co-defendant, took place before the Hon. Herbert J. Stern in May, 1981. On motion, Judge Stern recused himself from the trial of indictment 81-144, and both indictments were transferred to the Hon. H. Lee Sarokin.

Prior to trial on indictment 81-144, petitioner, joined by his co-defendants, moved to dismiss the indictment on the grounds, *inter alia*, that the process of selecting grand jury forepersons

and deputy forepersons in the District of New Jersey discriminated against Black people and women, thereby depriving petitioner of rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States. Judge Sarokin denied the motion. *United States v. Musto*, 540 F.Supp. 346 (D.N.J. 1982). Petitioner was convicted of 24 counts named in Indictment No. 81-144.

Following the *Musto* trial, Indictment No. 81-145 was transferred to the Hon. H. Curtis Meanor. Petitioner moved to dismiss the indictment on the same grounds as those raised in *Musto*. By Order of August 31, 1982, App. D, Judge Meanor adopted the record in *United States v. Musto*. The motion to dismiss was denied. Petitioner was convicted of one count of violating 18 U.S.C. § 2314. Petitioner was sentenced to a term of five years imprisonment, to run consecutive to the term imposed for the convictions in Indictment No. 81-144.

On appeal of *United States v. Musto*, the Court of Appeals for the Third Circuit affirmed the convictions, holding, *inter alia*, that the position of grand jury foreperson is without constitutional significance. *United States v. Aimone*, 715 F.2d 822 (3rd Cir. 1983).

On appeal of *United States v. D'Agostino*, the court of Appeals for the Third Circuit affirmed petitioner's conviction, wtihout opinion. App. A.

Lawrence Dentico and Dominick D'Agostino filed a Petition for Writ of Certiorari on October 24, 1983, No. 83-681 alleging that the exclusion of Blacks and women deprived them of rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States. The instant petition raises the identical claim on the same record.

REASONS FOR GRANTING THE WRIT

Petitioner adopts and fully incorporates by reference all arguments in favor of granting the writ set forth in the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agos-*

tino v. United States of America, No. 83-681, docketed on October 24, 1983.

CONCLUSION

Petitioner fully adopts and incorporates by reference the conclusion set forth in the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983.

Respectfully submitted,

WILLIAM M. KUNSTLER
Kunstler & Mason
13 Gay Street
New York, New York 10014
(212) 924-5661
Attorney for Petitioner

Dated: November 11, 1983
New York, N.Y.

APPENDIX

APPENDIX A

United States Court of Appeals

for the

Third Circuit

No. 83-5029

UNITED STATES OF AMERICA,

vs.

D'AGOSTINO, DOMINICK

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 81-0145-02)
District Judge: Honorable H. Curtis Meanor

Argued
September 26, 1983
Before: ALDISERT and BECKER, *Circuit Judges*,
and POLLAK, *District Judge*.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: (1) the trial court erred in denying the motion for a judgment of acquittal because evidence was insufficient to sustain the verdict; (2) the trial court abused its discretion in admitting Orlandini's testimony and erred in failing to grant a new trial on Count Three after the acquittal on Count One; (3) the trial court erred in denying the motion to adjourn the trial pending the outcome of the appeal in *United States v. Musto et al.*; (4) the court's questioning of Charles Anastasi required the grant of a new trial; (5) the pre-indictment delay denied D'Agostino due process; (6) the trial judge's imposition of a consecutive sen-

tence, based upon disputed and insufficiently reliable evidence and consideration of material facts not proved to the (Cu)requisite degree of certainty, constituted a denial of due process; and (7) the trial court erred in refusing to dismiss the indictment on the grounds of discrimination in the selection of forepersons and deputy forepersons for grand juries in the District of New Jersey; it is

ADJUDGED and ORDERED that the judgment of the district court be and is herby affirmed.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
Sally Mrvos, Clerk

DATED: SEPT. 27, 1983

Certified as a true copy and issued in lieu of a formal mandate on October 31, 1983.

Test:

Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX B

Petitioner hereby incorporates by reference Appendix A to the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983. Said appendix includes the opinion of the Court of Appeals for the Third Circuit in *United States v. Aimone*, 715 F.2d 822 (1983).

APPENDIX C

Petitioner hereby incorporates by reference Appendix B to the Petition for Writ of Certiorari in *Lawrence Dentico and Dominick D'Agostino v. United States of America*, No. 83-681, docketed on October 24, 1983. Said appendix includes the opinion of the United States District Court for the District of New Jersey in *United States v. Musto*, 540 F.Supp. 346 (D.N.J. 1982).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO. 81-145

UNITED STATES OF AMERICA,
v.
DOMINICK D'AGOSTINO,
Defendant.

TRANSCRIPT OF
PROCEEDINGS
MOTION

Newark, New Jersey
August 31, 1982

BEFORE:

THE HONORABLE H. CURTIS MEANOR, U.S.D.J.

Appearances:

W. HUNT DUMONT, UNITED STATES ATTORNEY
BY: SAMUEL ROSENTHAL, Assistant United States Attorney
and
STANLEY CHESLER, Dept. of Justice
For the Government

PODVEY, SACHS, CATENACCI & SILBER, ESQS.
BY: ALAN SILBER, ESQ. and
MERYL RUBIN, ESQ.
Attorneys for the Defendant.

MR. RUBIN: Yes, sir.

THE COURT: On the motion regarding the selection of grand jury forepersons, or deputy forepersons, this Court will adopt the opinion of Judge Sarokin filed June 3rd, 1982 on the matter. And the motion will, therefore, be denied.

I believe the Musto appeal will probably come down before any appeal in this case will control in any event, right?

MR. CHESLER: Your Honor, the Department of Justice, the government would just request the Court to take judicial notice of the fact that Camden was excluded.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5029

UNITED STATES OF AMERICA

vs.

D'AGOSTINO, DOMINICK,

Appellant

(D.C. Crim. No. 81-0145-02)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and POLLAK, *District Judge*.*

The petition for rehearing filed by

Appellant

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Judge

Dated: Oct. 21, 1983